STATE OF MICHIGAN
IN THE SUPREME COURT

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153356
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RASMER,

Defendant-Appellee.

/

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DEFENDANT-APPELLANT'S MOTION TO FILE A LATE REPLY BRIEF

NOW COMES Defendant-Appellant Estate of Rasmer, by and through its attorney, Gary P. Supanich, and for its Motion to File a Late Reply Brief, states as follows:

1. On March 15, 2016, the Estate of Rasmer, by and through its attorney Colin M. Dill, filed an Application for Leave to Appeal in the above-referenced case (S. Ct. No. 153356) from a portion of the published and authored opinion of the Court of Appeals on February 4, 2016 (Jansen, P.J., and Cavanagh and Gleicher, JJ) issued in COA Nos. 323090, 323185, 323304 and 326642 (*In re Gorney*), affirming in part, reversing in part, and remanding for further proceedings, with a partial concurrence and partial dissent by Judge Jansen.

2. On March 17, 2016, the DHHS also filed an Application for Leave to Appeal in S. Ct. Nos. 153370-153373 from a different portion of the Court of Appeals' decision in *In re Gorney*.

3. On April 6, 2016, the undersigned attorney, Gary P. Supanich, filed his appearance as counsel on behalf of all the Estates in S. Ct. Nos. 153370-153373.

4. On April 12, 2016, the DHHS filed an Answer to the Estate of Rasmer's Application for Leave to Appeal in this matter (S. Ct. No. 153356).

5. On April 19, 2016, the undersigned attorney, Gary P. Supanich, filed his appearance as co-counsel for the Estate of Rasmer in this case (S. Ct. No. 153356).

6. On April 28, 2016, the undersigned attorney, Gary P. Supanich, filed an Answer to the DHHS' Application for Leave to Appeal in S. Ct. Nos. 153370-153373.

7. On May 19, 2016, the DHHS filed its Reply to the Answer to the DHHS' Application for Leave to Appeal in in S. Ct. Nos. 153370-153373.

8. On Saturday, June 8, 2016, the Elder Law and Disability Section voted to approve Attorney Supanich's "Application for Consideration" for funding of the undersigned attorney to prepare and file a Motion to File a Late Reply Brief, with the attached Reply Brief (**Exhibit**), in support of the Estate of Rasmer's Application for Leave to Appeal in S. Ct. No. 153356.

9. Given the nature and complexity of the questions at issue in both Applications arising from the Court of Appeals' decision in *In re Gorney*, the undersigned attorney requests that this Court grant the present Motion to File a Late Reply Brief in response to the DHHS' Answer to the Estate of Rasmer's Application for Leave to Appeal. Specifically, undersigned counsel believes that the Late Reply Brief will aid in the administration of justice by assisting this Court in making its determination as to the proper deposition of the questions presented in the Estate of Rasmer's Application for Leave to Appeal in S. Ct. No. 153356, as well as the DHHS' Application for Leave to Appeal in S. Ct. Nos. 153370-153373, regarding the jurisprudentially significant questions involving estate recovery, such as substantive and procedural due process, the scope of property rights that attach to the protection and preservation of estate assets, the standards governing the cost-effectiveness of estate recovery, and the fiduciary and legal duties that attorneys have in representing estates against estate recovery.

WHEREFORE, for the foregoing reasons, Defendant-Appellant Estate of Rasmer requests that this Honorable Court grant its Motion to File a Late Reply Brief, with the Late Reply Brief attached as an exhibit.

Respectfully submitted,

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Dated: June 8, 2016

EXHIBIT

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellee,

v

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DEFENDANT-APPELLANT ESTATE OF RASMER'S LATE REPLY BRIEF TO THE DHHS' ANSWER TO THE ESTATE'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Estate of Olive Rasmer ("the Estate") respectfully requests that this Court grant its Application for Leave to Appeal from the Court of Appeals' published split-decision authored by Judge Gleicher in *In re Estate of Irene Gorney*, (Jansen, J, concurring in part, dissenting in part) on February 4, 2016 [COA Nos. 323090, 323185, 323304, 326642], affirming in part, reversing in part, and remanding for further proceedings in these consolidated cases involving estate recovery of Medicaid benefits. Contrary to Plaintiff-Appellee Department of Health and Human Services' ("DHHS") claim (Answer, pp 1-5), the Court of Appeals' decision presents issues of significant public interest involving a state agency under MCR 7.305(B)(2); jurisprudentially significant questions under MCR 7.305(B)(3); and a "decision [that] "is clearly erroneous and will cause material injustice" under MCR 7.305(B)(5)(a).

Specifically, the panel of Court of Appeals (Jansen PJ, and Cavanagh and Gleicher, JJ) reversed in part the probate court decisions denying estate recovery by the DHHS, holding that the DHHS complied with state statutory notice requirements, as well as state and federal constitutional due process requirements, when the DHHS informed the decedents of estate recovery provisions stated in the Michigan Medicaid estate recovery program [MMERP], MCL 400.112g, in their annual "redetermination" applications beginning in 2012, but not when the decedents had initially enrolled in the Medicaid program, as the Estates argued. (*Gorney*, slip op, p 2). In reversing the probate courts' orders in these respects, the Court of Appeals maintained that the statutory notice and due process issues were already raised and decided in *In re Estate of Keyes*, 310 Mich App 266 (2015), lv den 498 Mich 968 (2016). (*Gorney,* slip op, pp 2, 5). Being bound by *Keyes* pursuant to MCR 7.215(J), the Court of Appeals concluded that MCL 400.112g(3)(e) and MCL 400.112g(7) provided them with sufficient statutory notice of

being subject to the estate recovery program when filing an application for redetermination of Medicaid eligibility. (*Gorney*, slip op, pp 5-6). The Court of Appeals also found that *Keyes* controlled the issue whether due process was violated on the ground that the Estates were not given notification of estate recovery at the time of her initial enrollment in the Medicaid program. (*Gorney,* slip op, pp 7-8).

In its Application, the Estate of Rasmer challenges the Court of Appeals' decision in *Gorney,* holding on the basis of *Keyes* that notice of estate recovery at the time of the Medicaid "redetermination" decision was reasonable under MCL 400.112g and that such notice did not violate the federal and state constitutional due process clauses. Relying upon *Dow v State of Michigan*, 396 Mich 202 (1976), the Estate argues that *Keyes* wrongly decided the due process notice issue because the Estate was entitled to receive proper notice of the nature and extent of estate recovery at the time of her enrollment in the Medicaid program.

In its Answer, the DHHS counters that the Application should be denied because the Court of Appeals already correctly decided the issues in *Keyes, In re Estate of Ketchum,* ___ Mich App ___ slip op, p 10, (20016) and *In re Estate of Clark,* unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015 (Docket No. 320720), slip op, p 7, on the grounds that the DHHS provided sufficient statutory notice of estate recovery in conformity with MCL 412.112g(7) and afforded the Estate with adequate notice under the state and federal due process clauses. Specifically, relying upon *Keyes*, 310 Mich App at 268, 272-273-275, the DHHS asserts that "the *Gorney* Court correctly held in this case that an applicant who seeks Medicaid long-term care benefits after receiving the written information printed on the application has received timely and sufficient notice for estate recovery and that related to the timing and sufficiency of notice there was no due process violation." (Answer, p 3).

The DHHS' reliance upon *Keyes'* finding that there was no due process violation is misplaced. Specifically, even if *Keyes* correctly the statutory notice issue under MCL 400.112g(3)(e), namely, that notice to an individual of estate recovery was not required at the time of the individual's enrollment in Medicaid, and that, under MCL 400.112g(7), the DHHS may provide proper notice of estate recovery when the individual has sought Medicaid eligibility for long-term care services, *Keyes* wrongly decided the due process issue because timely and reasonably sufficient notice of the nature and scope of the estate recovery program was required at the time that Olive Rasmer enrolled in Medicaid. Accordingly, given the jurisprudential significance of the constitutional notice issue determined in *Keyes*, this Court should grant the Estate's Application to address whether *Keyes* was wrongly decided as a matter of due process, especially since this Court previously denied the Application for Leave to Appeal in *Keyes* and has yet to decide for itself whether the Court of Appeals' interpretation passes constitutional muster.

As stated in the Answer to the DHHS' Application for Leave to Appeal (S Ct. Nos. 153370-153373), the procedural due process issues involving notice of estate recovery presented in this Application are intimately intertwined with the substantive due process, retroactivity and cost recovery issues presented in the DHHS' Application. In the interest of Michigan jurisprudence, an integrated analysis is required to address all the questions presented in both Applications. Accordingly, this Court should grant and consolidate both Applications, affording full briefing and argument to the parties and providing the opportunity for all interested groups to submit amicus briefs on the important public and jurisprudential questions that are presented therein.

STATEMENT OF FACTS

In its Counter-Statement of Facts, the DHHS glosses over significant facts informing the procedural due process notice issue being presented in this Application. While the DHHS correctly acknowledges that Olive Rasmer began receiving Medicaid benefits in 2009, she was not provided with any written materials about Michigan's Medicaid estate recovery plan at the time of her enrollment. In fact, she did not become aware that the Department of Community Health had the legal right to seek estate recovery until her authorized representative submitted her application for redetermination of Medicaid benefits on September 30, 2013. She died on March 16, 2014 and her Will was offered to the Bay Probate Court on May 19, 2014. As the Bay Probate Court properly determined, '[t]his was the first verifiable notice of Medicaid recovery – at least years after she was first enrolled and approximately four months prior to her death."

ARGUMENT

PURSUANT TO THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION, MCL 400.112g(7), AS INTERPRETED BY THE COURT OF APPEALS IN *KEYES* AND *GORNEY*, VIOLATES DUE PROCESS BECAUSE MEDICAID APPLICANTS ARE ENTITLED TO TIMELY AND REASONABLY SUFFICIENT NOTICE OF THE MEDICAID ESTATE RECOVERY PROGRAM AT THE TIME THE INDIVIDUAL ENROLLS IN MEDICAID FOR LONG-TERM CARE SERVICES.

As the analytical point of departure, it is important to keep in mind that an essential part of the due process guarantee of an opportunity to be heard is the corollary promise of prior notice. See *Mathews v Eldridge*, 424 US 319, 325 n 4 (1976)(summarizing the due process factors set forth in *Goldberg*); 4 Wright & Miller, *Federal Practice and Procedure*, § 1074 at 456 (2d ed. 1987)(stating that the "requirement of reasonable notice must be regarded as part of due process"). Rudimentary due process protection includes timely and reasonably sufficient

notice and an opportunity to be heard. *Goldberg v Kelly*, 397 US 254, 267 (1970)(holding that "timely and adequate notice" is required). As set forth in *Mullane v Central Hanover Bank & Trust Co*, 399 US 306, 314 (1950), "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.)

Accordingly, the Medicaid estate recovery statute allowing the State to engage in estate recovery for long-term care assistance afforded to the Medicaid applicant must comply with the procedural due process protections provided by the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution. See *Dow v State*, 396 Mich 192, 202 (1976) ("The Due Process Clause is a limitation on state action."). For the purpose of rational life and estate planning, timely and reasonably sufficient notice of the nature, manner and scope of the estate recovery program is thus necessary at the time of enrollment in the Medicaid program in order to allow an individual to consider planning options on an informed basis so as to arrange one's affairs, preserve the bounty of one's life and protect the right to dispose of one's property, to the extent permitted by law. *Id.* at 204 (stating that "the actual owner * * * of real estate, chattels or money" has "property interests protected by procedural due process"), citing *Bd of Regents v Roth*, 408 US 564 (1972). Clearly, timely and reasonable sufficient notice of the actual extent and scope of the estate recovery provisions is essential at the time of the enrollment in order to make an informed decision about whether to enter into the Medicaid program in the first place, given the potential consequences of estate recovery.

Here, Michigan's Medicaid statutory notice procedure, as interpreted by the Court of Appeals in *Keyes* and *Gorney*, deprived applicants, with significant interests in property

protected by the Due Process Clauses, of timely and reasonable sufficient notice of the nature, manner and scope of the estate recovery program when they enrolled in Medicaid. Specifically, the Court of Appeals in *Gorney's* reliance upon *Keyes* for the proposition that notice of the estate recovery program was not required at the initial Medicaid enrollment, but only at the time of the eligibility determination, was violative of procedural due process under the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution because Olive Rasmer was entitled to timely notice "reasonably calculated, under all the circumstances, to apprise [her] of the pendency of the action and afford [her] an opportunity to present [her] objections." *Mullane, supra* at 314. Simply put, what is required by due process is that the DHHH provide the individual with the written materials describing the provisions of the Michigan Medicaid estate recovery program "at the time an individual enrolls in Medicaid for long-term services." Here, it is apparent that the critical language – "at the time an individual enrolls in Medicaid for long-term services" – was inadvertently omitted (by accident, mistake or simple carelessness) by the Legislature in drafting MCL 400.112g(7), even though it was used in MCL 400.112g3(e). As a result, the statutory notice provision, as interpreted by the Court of Appeals, created the due process violation that this Court is asked to remedy.

Contrary to the Court of Appeals' analysis in *Keyes*, it is necessary to recognize that the due process violation at issue stems from what is required by the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution, not from what is required by MCL 400.112g. According to the Court of Appeals' interpretation in *Keyes* (and followed in *Gorney*), MCL 400.112g does not require timely and reasonably sufficient notice of the estate recovery program at the time of enrollment. But that is precisely the problem, for it is the timeliness and adequacy of Michigan's notice provision in MCL 400.112g(7) that is being

challenged as violative of due process. Thus, *Keyes* begged the question when it reasoned that there was no due process violation because "MCL 400.112g does not require notice at the time of enrollment" for what is being challenged on the basis of due process under the state and federal constitutions is that MCL 400.112(g) violates due process because it does not provide timely and reasonably sufficient notice about the actual provisions of the estate recovery program at the time of enrollment in Medicaid. *Keyes* erred because it wrongly conflated the analysis for statutory and due process notice issues, without providing a separate and distinct analysis of the due process issue. Simply put, statutory notice provided by MCL 400.112g(7) does not satisfy the requirements of due process

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, this Court should GRANT the Defendant-Appellant Estate of Rasmer's Application for Leave to Appeal under 7.305(B)(1), (2) and (3), along with the Department of Health and Human Services' Application for Leave to Appeal in *In re Estate of Gorney* [S Ct. Nos. 153370-153373], and place these cases on calendar call to allow for full briefing and argument. Above all, it is vitally necessary to the bench and bar that this Court provide a coherent and systematic analysis of the interrelated issues of procedural and substantive due process, retroactivity, and judicial review of the DHHS' cost-effectiveness determinations of estate recovery under the Michigan Medicaid Estate Recovery Program.

Respectfully Submitted,

By: _____

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Dated: June , 2016